IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 11TH SEPTEMBER 2007 / 20TH BHADRA 1929

CRL.A.No. 1108 of 2004(C)

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SC.477/2001 ON THE FILE OF THE COURT OF THE ADDL. SESSIONS JUDGE FAST TRACK COURT NO.I (ADHOC) MANJERI.

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APPELLANTS: ACCUSED:

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1. PULIKKAL BEERANKUTTY @ CHETH FAIZAL @ KUNHAPPU, S/O. ALAVI, NEDIYIRIPPU, MUKKOTTU, MALAPPURAM DISTRICT.

2. PANGADAN ABDUL RAZAK, S/O.KUNHIKAMMU, CHOYAPARAMBU HOUSE, KARIPOOR, PULIYAMPARAMBA, MALAPPURAM DISTRICT.

3. KRISHNADAS @ UNNI NAIR, S/O. DAMODHARAN NAIR, KODOVAZHANJI VEEDU, KANNAMANGALAM, MALAPPURAM DISTRICT.

4. EDAYADAN SAIDALAVI, S/O. MUHAMMED, PANIKKARAPURAYA VEEDU, PERUVALLUR, KADAPADY, MALAPPURAM DISTRICT.

5. CHAKKACHANPARAMBATH FAIZAL, S/O. MOIDEENKUTTY, KUTTUR, MUKKILPEEDIKA, MALAPPURAM DISTRICT.

6. AREEKKAN FAZALUL RAHMAN, S/O. BEERANKUTTY, AREEKKAN VEEDU, KUTTUR NORTH, MALAPPURAM DISTRICT.

BY ADV. SRI.BABU S. NAIR
SRI.T.V.GEORGE
SMT.LINDA GEORGE

RESPONDENT: STATE:
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THE STATE OF KERALA,
REPRESENTED BY THE CIRCLE INSPECTOR OF POLICE,
THENHIPALAM POLICE STATION - THROUGH THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM, KOCHI-31.

BY P.P.SRI.PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 11/09/2007, THE COURT ON 11/09/2007 DELIVERED THE FOLLOWING:

Crl.M.A.No. 7850/2004 in Crl.A.No. 1108/2004

Dismissed.

11th September, 2007

Sd/-K. Thankappan,
Judge.

mn.

K. Thankappan, J.

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Crl. A. No. 1108 of 2004

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Dated this the 11th day of September, 2007

JUDGMENT

Accused in S.C. No. 477/2001 on the file of the Court of the Addl. Sessions Judge Fast Track Court No.I (Adhoc), Manjeri are the appellants. They faced trial for offence punishable under section 395 IPC. The prosecution allegation against the appellants is that at about 9.15 p.m. all the accused in furtherance of their common intention to commit decoity chased the de-facto complainant in a jeep No.KL.10J.6147 and blocked scooter bearing No.KLG 7327 driven by the defacto complainant and caught hold the defacto complainant and manhandled him and accused 2 and 3 took away MO1 bag containing Rs.50,000/- kept in the scooter and all the accused assisted them in perpetrating the crime and therefore they committed the offence. Before committal proceedings, the 2nd accused in the original crime was declared absence and his case was split up and the present appellants were faced trial as accused Nos.1 to 6 in the above case. To prove the charge against the appellant, PWs.1 to 12 were examined and Exts.P1 to P16 and Mos. I and II were marked. After closing the

evidence on the prosecution side, the appellants were questioned under section 313 of Cr.P.C. They denied the allegation. On the side of the defence, DWs.1 and 2 were examined. After considering the evidence, the trial court found the appellants guilty of the offence punishable under section 395 IPC and they were convicted thereunder and sentenced to undergo rigorous imprisonment for seven years each and to pay fine of Rs.15,000/- each and in default to undergo simple imprisonment for three years. The trial court also directed that if the fine amount was realized that should be paid to the victim. The conviction and sentence awarded against the appellant are assailed in this appeal.

2. Heard.

3. Learned counsel for the appellant has raised the following contentions to challenge the impugned judgment:- Firstly, it is contended that the trial court had committed serious error in believing the evidence of the prosecution to find the appellants guilty under section 395 IPC. Secondly, it is contended that there was no proper identification of the accused. Thirdly, it is contended that the trial court has committed serious error in finding the appellant guilty under section 395 IPC on the basis of the confession statement alleged to have been given by the 1st accused to PW11 Sub Inspector of Police.

4. The trial court had considered the evidence of PW1 and came to the conclusion that PW1 had properly identified the 1st accused. In this context, it is relevant to note that in Ext.P1 he stated that while he was riding his scooter, his scooter was blocked by a jeep. He stopped the scooter due to the blockage and at that moment 4 travellers in the said jeep suddenly jumped out and two of them caught hold of his neck and he was manhandled for few minutes. He fell down in the tarred road . The said two persons continued manhandling him by kicking his chest and dragging him through the tarred road. The other two robbers snatched the bag containing money. Due to the unexpected manhandling, he could not come his voice for a short while. Thereafter he lost his presence of mind and he remained there for few minutes. When he regained his presence of mind, he made loud cry and on hearing his cry, local people reached there. In chief examination he stated that he identified the 1st accused. When he was cross-examined, he stated that he had identified the 1st accused at the police station. When he was further cross-examined he stated that "കുറഞ്ഞത് driver അടക്കം 5 പേർ ഉണ്ടായിരുന്നു എന്നാണ് മനസ്സിലാക്കിയത്" .

This witness also stated that "A1 ഒഴികെ മറ്റുള്ള പ്രതികളെ police കാണിച്ച പ്പോഴാണ് ഞാൻ തിരുച്ചറിഞ്ഞത്" In this context, the evidence of

PW10 would show that he had previous occasion to see the 1st accused visiting the house of one Saidalavi and the said Saidalavi has got criminal antecedents concerning theft of vehicles and he knew that Saidalavi was involved in similar cases. He also stated that once PW10 had noticed the arrival of the 1st accused to the house of the said Saidalavi in an omni van. He further stated that on the relevant night he had seen the 1st accused at Parambil Peedika, just one hour prior to the incident and on suspicion he enquired with one Musthafa and came to know his name as Cheth Faisal. The evidence of PW10 is only hear say evidence. Hence, the evidence of PW10 cannot be considered as a corroborative piece of evidence. Evidence of PWs.1 and 2 would not show the identity of the persons as the accused who jumped out of the jeep, caught hold of him and robbed his bag as alleged by the prosecution. In this context the learned counsel for the appellant brought to the notice of a decision of the Supreme Court reported in Budhsen and another V. State of U.P. (AIR 1970 SC 1321). In the above decision the Apex Court held that as a general rule, the substantive evidence of a witness was a statement made in court. The evidence of mere identification of the accused persons at the trial for the first time was from its very nature inherently of a weak character. The Apex Court also held that it was accordingly considered a safe rule of prudence to generally look

for corroboration of the sworn testimony of witnesses in court as to the identify of the accused who are strangers to them, in the form of earlier identification proceeding. The learned counsel for the appellant submits that the prosecution had not conducted any identification parade to identity the accused as the persons who committed the alleged offence. In this context, it is also to be noted that PW1 was questioned by the police more than six times and all these times PW1 could not have given any evidence regarding the identity of the accused who involved in the commission of the offence. The trial court found that the first information statement do not contained any clue regarding the identity of the accused. PW11 investigating officer has no case before the court that PW1 had identified the accused. If that be so, the trial court had committed serious error in finding that PW1 identified the accused.

5. The next question to be considered is with regard to the confession statement given by the 1st accused to PW11. Admittedly, there is no recovery under section 27 of the Evidence Act. If that be so, the trial court is not correct in placing reliance on PW11 regarding the alleged confession statement given by the 1st accused. With regard to the acceptance of confession statement made by the 1st accused, as per sections 25 and 26 of the Evidence Act confession made by an accused to a

police officer is not admissible in evidence. If that be so, the trial court has committed serious error in placing reliance on the confession statement alleged to have been given by the 1st accused. There was no evidence to show that Mos.1 and 2 were recovered on the basis of the alleged confession statement given by the accused to PW11. If that be so, the confession statement alleged to have been given by the 1st accused cannot be used against the accused. In this context, the learned counsel for the appellant brought to the notice of this court a decision reported in Kalpanath Rai V. State (through CBI) (AIR 1998 SC 201). In the above decision the Apex Court held that under sections 25 and 26 of the Evidence Act no confession made by an accused to a police officer, or to any person while he was in police custody could be admitted in evidence and under section 162 of the Cr.P.C. no statement made by any person during investigation to a police office could be used in a trial except for the purpose of contradiction and for the purpose of section 27 of the Evidence Act.

6. Another point to be considered is with regard to the production of Mos.1 and 2. There is no evidence given either by PW11 or any other witness regarding the recovery or seizure of MOs.1 and 2. Though in re-examination PW1 identified MO1, description of MO1 bag was not given .

Even if MOs.1 and 2 were recovered and produced on any confession statement recorded by investigating officer, it should be proved properly by adducing evidence. In this context, the trial court committed serious error in accepting the evidence of PW1. PWs.3, 4 and 5 had given evidence before the court that they saw PW11 Sub Inspecator of Police seizing certain amount from accused Nos.3, 4 and 5. The seizure is also not properly proved before court and the material objects were not properly identified by PW1 or PW11 and the recoveries of MOs.1 and 2 are not under section 27 of the Evidence Act.

7. In the above circumstances, this Court is of the view that the finding of the trial court is not based on any acceptable evidence. Hence, the convictions and sentence ordered against the appellants are hereby set aside and the appellants are acquitted. Fine amount, if any, deposited by the appellants, it shall be refunded to them as per law. Bail bond executed by the appellants shall stand cancelled.

The appeal is allowed as above.

K. Thankappan,
Judge.

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**K. Thankappan,J.**

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**Crl.A. No. 266 of 2006**

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**Judgment**

**11-7-2007**